

BEFORE THE
GOVERNING BOARD OF THE
RIALTO UNIFIED SCHOOL DISTRICT
SAN BERNARDINO COUNTY, CALIFORNIA

In the Matter of the Reduction in
Force Proceeding Involving:

Ninety-Six Certificated Employees of
the Rialto Unified School District
Who Received Preliminary Layoff
Notices for the 2011-2012 School
Year,

Respondents.

OAH No. 2011030921

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Etiwanda, California, on April 21, 2011.

John W. Dietrich, Attorney at Law, and Paul Z. McGlocklin, Attorney at Law, represented the Rialto Unified School District.

Carlos R. Perez, Attorney at Law, represented the respondents appearing at the reduction in force proceeding.

The matter was submitted on April 21, 2011.

FACTUAL FINDINGS

The Rialto Unified School District

1. The Rialto Unified School District is located in Rialto, between the cities of Fontana and San Bernardino. It serves students living in the communities of Rialto, Colton, Fontana, San Bernardino, and Lytle Creek.

The District is one of the largest school districts in California. It serves approximately 26,600 Kindergarten through 12th grade students at 19 elementary schools, five middle schools, three comprehensive high schools, and an adult continuation school. Approximately 28 percent of the students are English Language Learners. About 88 percent of the student body is eligible to participate in the hot lunch program.

The District employs nearly 2,700 persons, about 1,240 of whom are certificated employees who provide direct services and supports to students. The District has an annual budget of approximately \$240 million.

2. The District is governed by an elected five-member Board of Education. Harold L. Cebrun, Sr., Ph.D. is the District Superintendent and the Board's Chief Executive Officer. Felix Avila is an Assistant Superintendent of Schools, Personnel Services. Rhonda D. Kramer is a Senior Director of Personnel Services.

The Fiscal Crisis

3. After Proposition 13 was implemented in 1978, public schools have obtained financing primarily from the State of California. A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event that is supposed to occur each year in late June. Before then, a school district's governing board, which has the duty to produce a balanced budget and to file that budget with the County Department of Education, is required to take steps to ensure that financial ends will meet if the worst-case financial scenario develops.

California's recent economic problems have had a crippling impact on the Rialto Unified School District and other public school districts. If the District is unable to meet its financial obligations, a "negative" certification can be assigned that would allow the San Bernardino County Office of Education to intervene and take over the District's operations.

With regard to the budget for the 2011-12 school years, the District anticipates that it will receive \$349 less per student in average daily attendance funding than it currently receives. This reduction in funding will result in a \$9.5 million shortfall for the 2011-12 school year.

The District's Response

4. In response to the anticipated budgetary shortfall for the 2011-12 school year, District administrators reviewed services, staffing ratios, and class size. They determined that class size could be increased and that certain services could be reduced or eliminated. Based on current projections regarding the budget, Assistant Superintendent Avila and District staff recommended that 107.5 full time equivalent certificated positions be eliminated. Assistant Superintendent Avila and District staff also recommended that 25 administrative positions be eliminated for the 2011-12 school year, although the elimination of those positions was not set forth in the Board's resolution because it is the subject of a parallel proceeding. Assistant Superintendent Avila and District staff also recommended that approximately half a dozen preschool full time equivalents be eliminated as a result of a decline in the District's Title I funding. Declining student enrollment was not a factor in reaching these very difficult staffing recommendations.

On March 9, 2011, Superintendent Cebrun recommended to the Governing Board that 107.5 full-time equivalent K-12 teaching and support positions be

eliminated for the 2011-12 school year and that the services of a corresponding number of certificated employees be terminated at the end of the 2010-11 school year.

Based upon attrition and vacancies, Assistant Superintendent Avila concluded that it would be necessary for the District to issue preliminary layoff notices to 96 full time equivalent credentialed employees whose services fell within the 107.5 full time equivalent positions identified in the recommendation Superintendent Cebrun submitted to the Governing Board.

5. On March 1, 2011, following Superintendent Cebrun's staffing recommendation, the Governing Board adopted Resolution No. 10-11-31. It provides:

WHEREAS, the Board of Education of the Rialto Unified School District has determined that the particular kinds of services set forth herein must be reduced or discontinued; and

WHEREAS, it is the opinion of the Board that because of the aforementioned reason, it is in the best interest of the District that the number of regular certificated employees of the District must be reduced; and

WHEREAS, this Board does not desire to reduce the services of regular certificated employees based upon reduction of average daily attendance during the past two years; and

WHEREAS, this Board has determined that due to a significant population of English language learners with specialized educational needs, a specific and compelling need exists to employ and retain certificated employees who have authorization to teach English Learner ("EL") students, as determined by the California Commission on Teacher Credentialing, and the special training and experience that comes therewith; and

WHEREAS, State law mandates that each failure to staff a classroom containing one or more EL students with a certificated employee possessing an appropriate EL authorization is a "misassignment" subject to sanction by the County Superintendent of Schools; and

WHEREAS, compliance with the provisions of the No Child Left Behind Act and the Williams Settlement require that EL students be served by certificated employees with appropriate EL

authorizations and that are No Child Left Behind compliant in the subject area they are teaching; and

WHEREAS, the needs of the District and the students thereof should not and cannot be adequately served by concentrating EL students in particular classrooms in such a manner as to lessen the need for certificated employees with EL authorizations; and

WHEREAS, Education Code section 44955(d) authorizes this Board to deviate from terminating certificated employees in order of seniority for the above reasons, if necessary; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Rialto Unified School District as follows:

A. That the particular kinds of services set forth below all be reduced or eliminated commencing in the 2011-2012 school year:

Counselor-Special Education:	1	F.T.E.
Elementary Intervention Strategists:	19	F.T.E.
Elementary Teachers:	7	F.T.E.
High School Counselors:	7	F.T.E.
High School Instructional Strategists:	5	F.T.E.
High School English Teachers:	4	F.T.E.
High School Math Teachers:	3.6	F.T.E.
High School Physics Teacher:	0.4	F.T.E.
High School Social Science Teachers:	4	F.T.E.
High School Social Teachers on Special Assignment:	1	F.T.E.
Middle School 6th Grade Teachers:	12	F.T.E.
Middle School Counselors:	4	F.T.E.
Middle School English Teachers:	5	F.T.E.
Middle School Instructional Strategists:	2	F.T.E.
Middle School Math Teachers:	4	F.T.E.
Middle School Multi-Handicapped Teacher:	1	F.T.E.
Middle School Science Teachers:	2	F.T.E.
Middle School Social Science Teachers:	5	F.T.E.
Middle School Teachers on Special Assignment:	7	F.T.E.
Pre-K Special Education Teacher:	1	F.T.E.
Preschool Teachers:	12	F.T.E.
School Nurse:	<u>0.5</u>	<u>F.T.E.</u>

TOTAL CERTIFICATED POSITIONS	107.5	F.T.E.
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B. That due to the reduction or elimination of particular kinds of services, a corresponding number of certificated employees of the District shall be terminated pursuant to Education Code section 44955.

C. That the reduction of certificated staff be achieved by the termination of regular employees and not by terminating temporary or substitute employees.

D. That “competency” as described in Education Code sections 44955(b), 44956, and 44957, for the purposes of bumping and rehire rights, shall necessarily include possession of a valid EL authorization and being No Child Left Behind Compliant in the subject area.

E. That, as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.

F. That the District Superintendent or designee is directed to initiate layoff procedures and give appropriate notice pursuant to Education Code sections 44955 and 44949.

PASSED AND ADOPTED this 9th day of March, 2011, in the County of San Bernardino, California.

6. Resolution No. 10-11-31 did not contain a “skipping” provision under Education Code section 44944, subdivision (d)(1).

The Particular Kinds of Services

7. The kinds of services identified in Resolution No. 10-11-31 were services that could be reduced lawfully under the Education Code. The Governing Board’s adoption of Resolution No. 10-11-31 was neither arbitrary nor capricious; its adoption was well within the Governing Board’s discretion. No particular kind of service was lowered to a level below that mandated by state or federal law. Resolution No. 10-11-31 was related solely to the economic crisis and the Governing Board’s duty to balance the budget.

The District’s Seniority List

8. The District maintains a seniority list, a constantly evolving document that is updated as new certificated employees are hired and as other employees retire, resign, or otherwise become separated from service with the District. The seniority list is a spreadsheet that is organized from the District’s most senior certificated employee to the most recently

hired certificated employee. The list contains each employee's seniority number, name, status (tenured, probationary, intern), a tie-breaking value for employees who provided service on the same first day, a seniority date (the employee's first date of paid probationary service with the District), the school site where current services are being provided, the employee's current assignment, and the employee's credentials on file with the District.

9. Early in 2011, when it became apparent that a reduction in force might become necessary, the District circulated a seniority list to all certificated employees with a request that each employee review that list and verify or update his or her seniority information; if an employee did not return the list to District administrative staff with corrections by March 15, 2011, the staff concluded that the information set forth in the seniority list was correct.

The Issuance of Preliminary Layoff Notices

10. Using the updated seniority list, Resolution No. 10-11-31, and the tie-breaking criteria, Assistant Superintendent Avila, Senior Director Kramer, and other staff members began the painstaking process of identifying those certificated employees who should receive preliminary layoff notices and those who should not. Four staff members spent two full days engaged in this tedious process.

Whenever an employee providing a particular kind of service eliminated by Resolution No. 10-11-31 was tentatively identified as being in line to receive a preliminary layoff notice, that employee's seniority and credentials were carefully examined to determine if that employee had the seniority, credentials, and competence to "bump" a junior employee and assume the more junior employee's position.

A similar process was used to evaluate the seniority of the administrative staff and the preschool staff subject to a reduction, and to determine if an administrative or preschool staff member subject to layoff had the seniority, credentials, and competency to assume a teaching position held by a more junior employee. With regard to the administrative staff employees, the Education Code required the District to use a two-step process before reassigning an administrator to a teaching position, a process that required final notice be given on or before June 30, 2011; if District action is not taken by that date, then the administrator will retain his or her assignment; an administrative staff member is not eligible to assume a teaching position unless the administrative employee is senior, credentialed, and competent to do so. With regard to the preschool staff, a preschool staff member cannot assume a teaching position unless the preschool staff member is senior, credentialed, and competent to do so.

11. Mr. Avila testified that during the selection process, the District failed to take into account a supplemental authorization in English held by Floyd Braggs (seniority number 1101) before it served preliminary layoff notices. Mr. Braggs was tenured employee with a seniority date of July 1, 2007, who served as a high school counselor. By reason of Mr. Braggs' seniority, competence, and credential that enabled him to teach English, it was determined that Mr. Braggs was improperly given a preliminary layoff notice. The District withdrew the notice and dismissed the accusation that it filed against Mr. Braggs.

12. Mr. Avila testified that the District improperly issued preliminary layoff notices to Ebony Hodges (seniority number 1237), a psychologist, and Linda Merino (seniority number 1092), and that the District had withdrawn those notices and had dismissed the accusations filed against them. There was no objection to the District doing so and there was no claim that these employees were being retained improperly.

13. Matilde Landin's employment as a District employee was terminated at the conclusion of the 2010-11 school year as a result of a previous reduction in force proceeding. The District rehired Ms. Landin on a temporary certificated contract for the 2010-11 school year due to an employee taking a leave of absence.

As a temporary employee, Ms. Landin was not subject to this layoff proceeding. Nevertheless, the District mistakenly served Ms. Landin with a preliminary layoff notice. When the District learned of its error, it withdrew the preliminary layoff notice issued to Ms. Landin, dismissed the accusation that had been filed against her, and served her with a letter dated April 19, 2011, that advised her that she would be released as a temporary employee at the end of the 2011-12 school year. In its letter, the District apologized for its error; but, the April 19, 2011, letter was not issued before Senior Director Aaron Rogers told Ms. Landin that she would not be terminated in the layoff proceeding.

Ms. Landin did not dispute her temporary status or the District's termination of her temporary employment, but she expressed concern about the District's asserted level of care given her personal situation and the mistakes that were made, a state of affairs that involved her improperly being identified for layoff, her bringing that matter to the District's attention, having her hopes of reemployment with the District lifted by Senior Director Rogers's comments, only to have those hopes dashed soon thereafter. Ms. Landin, who was not a respondent in this proceeding, underwent a very difficult experience. The District regrets the errors that resulted in this situation.

The Administrative Hearing

12. On April 21, 2011, the record in the reduction in force proceeding was opened. Jurisdictional documents were introduced. The caption was amended. An opening statement was presented on the District's behalf. Opening statements were not provided on behalf of any respondent and were waived. Sworn testimony was taken; documentary evidence was received; Assistant Superintendent Villa testified about the budgetary crisis and the layoff process; Senior Director Kramer testified about the seniority list and the District's efforts to ensure that the most senior employees were retained to provide services for which they were credentialed and competent; Senior Director Kramer responded to a number of questions posed directly by respondents; a written stipulation to jurisdictional facts was reached; closing argument was given; the record was closed; and the matter was submitted.

The Reduction in Force Proceeding

13. The enactment of Resolution No. 10-11-31 was the result of a budgetary crisis, not a decline in attendance; it was enacted in good faith; it was in the best interest of the District and its students. The District complied with all jurisdictional requirements. The

District used seniority, credentials, and competence as the basis for “bumping” junior employees, and the District retained the services of senior, competent, and appropriately credentialed employees to provide services currently being provided by more junior employees. The District’s tie-breaking criteria were applied in an appropriate and evenhanded manner, and the application of those criteria was in the best interest of the District and its students.

LEGAL CONCLUSIONS

Statutory Authority - Reduction in Force Proceedings

1. Education Code section 44949 provides in part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

. . .

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him

or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds . . .

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee. . . .

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified . . . and no probationary employee shall be deprived of his or her position for cause other than as specified . . .

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render . . .

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the

event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

Jurisdiction

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondents.

The Reduction of Particular Kinds of Services

4. A school board may determine whether a particular kind of service should be reduced or discontinued, and it cannot be concluded that the governing board acted unfairly or improperly simply because it made a decision it was empowered to make. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board's decision to reduce or

discontinue a particular kind of service need not be tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as the school district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

Competence

5. The Education Code leaves to a school board's discretion the determination of whether an employee must also be competent to be employed in a vacant position in addition to possessing seniority. The term "competent" relates to an individual's specific skills or qualifications, including academic background, training, credentials, and experience, but it does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.)

Information Filed with the County Superintendent after March 15, 2011

6. A credential recorded with the County Superintendent after March 15 cannot be used by a teacher to assert bumping or reassignment rights. The practical reason for this rule is that layoff notices must be given, if at all, by March 15 of any school year to effect a reduction in teaching staff for the ensuing school year. Should a teacher be allowed to present a certificate to the governing board after March 15 and thereby obligate the board to continue to employ that teacher, the board would by that date be precluded from serving a layoff notice to a junior teacher. This circumstance would result in the board being forced to retain an extra teacher on staff when the entire purpose of the layoff procedure is to allow the reduction of staff positions because there are fewer services being offered. (*Duax v. Kern Community College Dist.* (1987) 196 Cal.App.3d 555, 567-568.)

7. In this matter, the District allowed credentialing information to be used even if it was not on file with the District by March 15, 2011, so long as the credential was obtained before March 15, 2011. The District's practice in this regard was not unlawful, improper, or inequitable as long as it was applied to all credentialed employees.

Cause Exists to Give Notice to Certain Employees

8. As a result of the Governing Board's lawful reduction of particular kinds of service, cause exists under the Education Code for the District to give final notice to those respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the district for the 2011-2012 school year.

Determination

9. The charges set forth in the Accusation were sustained by the preponderance of the evidence except as otherwise stated herein. The adoption of Resolution No. 10-11-31 was related to the welfare of the District and its pupils. The District made necessary assignments and reassignments in such a manner that the most senior credentialed employees

were retained to render services that their seniority and qualifications entitled them to provide.

RECOMMENDATION

It is recommended that the Governing Board of the Rialto Unified School District issue final notices to the following certificated employees: Claudia Alas; Jorge Alvarez-Villalobos; Jeanene Ames; Jonathan Armel; Lance Atkinson; Gonzalo Avila; Joseph Baca, Jr.; Jennifer Bailey; Graciela Ballardo; Gail Bashaw; Olivia Botello; Denise Breden; Vanessa Bryant; Sandria Byrd; Helen Cabrera; Erika Campos; Theodore Caruthers III; Tonia Causey-Bush; Fatima Castillo; Rosario Centty; Sandra Chovan; Brent Copeland; Rosario Cortes-Quinones; Gregory Dalton; Rita Duran; Hilarie Dyson; Michele Escalona; Janet Espinosa; Ilene Estrada; Gina Felkins; Susan Ferrante; Eugene Florence IV; Ryan George, Anabel Granados; Germaine Gray; Juan Guitierrez III; Francisco Guzman; Elizabeth Hague; Markeisha Hall; Kristal Henriquez; Omar Herrera; Taryn Hudson; Holly Hunter; Sergio Infante; Horacho Jimmerson; Scott Johnson; Ronnie Kovich; Pauline Lam; Maria Landin; DeShawna Lang; Minh Lee; Elizabeth Lemaster; Lupe Leon-Urteaga; Valerie Linton; Sara Logan; Irene Lopez; Yessenia Lopez; Frederick Lorber; Diana Lynch; Kyle MacKenzie; Michael Masteller; Irma Matos; David McMillan; Laura McMullen; Vanessa McParland; Dorothy Mendoza; Shannon Miller; Rachel Monarrez; Mindy Monty; Doreen Morales; Mary Navas; Doreen Neagle-Leon; Lori Nessi; Teresa Olivares; Alejandro Olmos; Theresa Palacios; Carolyn Palmer; Susanne Piepenhagen-Sanchez; Steven Pierce; Daniel Polmounter; Kellen Quinto; Karla Realegeno; Vincent Ressa; Lance Riley; Mary Robles-Wallace; Eric Rodriguez; Agnim Rosas; Debbie Ross; Julie Ruffin; Danya Sanders; LaNaja Sankey; Davonne Santibanez; Mary Alice Smith; Suzette Stitt; Kristy Streff; Serena Straka; Susan Sutton; Kent Taylor; Sarah Torrey; Morokot Um; Griselda Uribe; Armando Urteaga; Jamie Velva Figuerola; Aldo Velasco; Jessica Wales; Kimberly Watson; Leona Whitley; and Sandra Williams.

Dated: April 26, 2011

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings